The ICC and its Relationship to Non-States Parties

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The International Criminal Court and its Relationship to Non-States Parties

Robert Cryer[‡]

1. Introduction

In some ways, the level of ratification of the Rome Statute is a triumph. In spite of pessimistic predictions about the likelihood of the Rome Statute entering into force quickly (or at all)[1] it took the (in international law terms) breakneck period of five years to achieve the necessary sixty ratifications to create the ICC. By way of contrast, this is roughly half the time it took for the International Covenant on Civil and Political Rights to come into force. At the time of writing there are 122 States parties to the Rome Statute, representing almost two thirds of the States in the world (although, in a more cosmopolitan sense, somewhat less than half of humanity). Hence, a significant number of States (including three of the five permanent members of the Security Council (China, Russia, and the United States)) are non-parties to the Statute, and therefore do not have any direct duties towards it. This is not to say that there can be no effect on third Party states, as Danilenko put it

> The *pacta tartiis* principle does not mean that treaties may not have certain indirect effects on non-States Parties. Practice suggests that multilateral treaty arrangements often create legal and political realities that could in one way or another affect political and legal interests of third States and impose certain constraints on the behaviour of non-parties. This constraints may not result not from imposition of legal obligations on Third States, but from the fact that a large portion of the international community adopts, in conformity with international law, a decision to deal with contemporary problems of community concern by creating appropriate institutions and procedures.[2]

However, the Rome Statute cannot operated to impose legal obligations on States. Whether it is liked or not, third states, absent Security Council action, have no obligations toward the Court. Furthermore, the facts of the continued ambivalence of some States towards to the Court, and the fact that the ICC has to operate in an international environment that is not entirely conducive to its actions,[3] cannot be ignored by the Court in its operational phase. This is most notable in the case of co-operation. It may not seem to be the most exciting aspect of the Court's practice, and it has to a considerable extent been passed-over in the commentary on the Court. However, it is key to the success of the Court that it obtain co-operation. Without it cases cannot be effectively progressed, either by the prosecution or defence.

That said, unfortunately to some extent, against the background of a weak enforcement regime for States parties (as the current difficulties the ICC is having with respect to

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‡ Birmingham Law School. This piece in part builds upon themes first discussed in 'The International Criminal Court and Its Relationship to Third States' in Göran Sluiter and Carsten Stahn (eds.) *The Emerging Practice of the International Criminal Court* (The Hague: Brill, 2008) 115.

[1] On which see William A. Schabas, *An Introduction to the International Criminal Court* (3rd ed., 2007) xi.

[2] Gennady Danilenko, "The Statute of the International Criminal Court and Third States" (1999-2000) 21 *Michigan Journal of International Law* 445, 448.

[3] For a short discussion see Olympia Bekou and Robert Cryer, "The International Criminal Court and Universal Jurisdiction: A Close Encounter?" (2007) 56 ICLQ 49, 54-5.

Kenya shows) co-operation is all too negotiable with even States parties, with non-State parties there is (outside of specific decisions of the Security Council on point) no obligation whatsoever to comply with orders of the ICC, hence any co-operation is a matter of pure goodwill. That goodwill has to be, one way or the other, earned by the ICC, and like all forms of diplomacy, involves compromise. As such the ICC, especially, albeit not solely, exists at the diplomatic level as well as the purely legal one.

It is impossible it is impossible to see the Court in acontextually. It is fundamentally important to draw a distinction between two aspects of the Court and its work. This is the distinction between what might be described as the "juridical" and the "diplomatic" roles that the Court has. On one hand, the Court is a judicial body, and it is beyond doubt that the decisions it makes must, as a criminal court, be based on the law. That is not a negotiable issue.

But within decisions there are degrees. Whilst they must be based on the law, there is also a careful balance to be made between what is necessary for a decision and attempts to clarify more general aspects of the law, especially when it is not necessary to do so. Against this background, it is key to understanding the Court to remember that the ICC is, as well as a judicial body, an international organisation, and one which, if it wants anything (including ratifications or accessions) from non-state parties, it has to persuade states to give it those things. Therefore, of necessity, it has to have, at some level, diplomatic role. It has to convince States to grant it assistance, and there are some people who are better at this than others. Nonetheless, of course, a careful balance has to be drawn in this circumstance between personnel in the court with experience of such affairs, and with the requirements of judicial propriety. There are various different ways in which this issue manifests itself.

3.1. Interpreting the Statute

The first of these is the simple fact that, the Court's early practice is being scrutinised closely by non-state parties, some of whom are adopting a "wait-and-see" approach to ratification of the Statute, and are therefore looking closely at the early jurisprudence of the Court to determine its approach, and fidelity, to the Statute. Others are looking for sticks with which to beat the Court, accusing it of judicial activism, or overbroad interpretations of the Statute. This is not a new fear, it manifested it in the drafting of the Rome Statute,[4] and the Elements of Crimes.[5] But it has not gone away, and if the Court is to gain the confidence of non-Party states (or, more optimistically, putative parties) then it needs to take certain precautions. In other words, the court must be careful in its interpretations of the Statute. States are watching closely, and any expansive readings, as have been suggested at times, have to be very careful when interpreting the Statute. The Court scares third parties, as well as states parties, at its peril. Especially if it needs anything from them, be it co-operation or possible ratification.

The balance that has to be drawn here is a careful one, and it would be folly to pretend to have precise answers to these very difficult problems, but it is worth bearing in mind

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[4] See, e.g. Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) Chapters 5-6.

[5] See, e.g.. William A, Schabas, "Interpreting the Statutes of the ad hoc Tribunals" in Lal Chand Vohrah *et al* (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (2003) 847, 887; Jacob Katz Cogan, "Competition and Control in International Adjudication" (2008) 48 VJIL 411, 421-2.

> international judges are keenly aware that while their rulings can be sweeping and influential, they work in *fragile institutions*. Judges cannot afford to ignore the larger circumstances in which their courts are situated, which subject them to pressures from competing loyalties, inadequate funding, public expectations, and the currents of politics.[6]

As Terris, Romano and Swigart have said, "International judges…face somewhat different problems from their national peers. Unlike national judges, international judges do not inherit courts of law; they need to build them. The credibility and legitimacy of their courts cannot be relied upon, but must be established."[7]

This traces the distinction made by Sir Hersch Lauterpacht between courts that have mandatory jurisdiction and those that have voluntary jurisdiction.[8] He, rightly, said that the principles of interpretation in the latter instance are necessarily less free than in the former. As he said, in the context of the ICJ

> If governments are not prepared to entrust with legislative functions bodies composed of their authorised representatives, they will not be prepared to allow or tolerate the exercise of such activity by a Tribunal enjoined by its Statute to apply the existing law…With this is connected a further reason for restraint and caution in the international sphere, namely, the fact that of the voluntary nature of the jurisdiction of international tribunals. An international court which yields conspicuously to the urge to modify the existing law-even if such action can be brought within the four corners of a major legal principle-may bring about a drastic curtailment of its activity. Governments may refuse to submit disputes to it or to renew obligations of compulsory judicial settlement already in existence.[9]

As the above implies, Lauterpacht was particularly of this view when it came to questions of jurisdiction.[10] Still, perhaps here goes a little too far, and indeed, elsewhere in his *magnum opus* on point provides his own counterpoint:

> At the same time, the necessity for bold judicial action is particularly great in the international sphere, *i.e.* in a system of law in which legislative opportunities for modifying rigid, unjust and obsolete rules are somewhat nominal. The result of the clash is not without interest, It shows itself in both the in the tendency to caution and the apparent desire to create the appearance of caution.[11]

It is no secret that the ICJ's jurisprudence, at least since the *South West Africa* Affair bears out the difficult relationship between innovation and keeping the parties convinced of

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[6] Daniel Terris, Cesare P.R. Romano and Leigh Stewart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (2008) at xx.
[7] *Ibid.*, 103-4.
[8] Hersch Lauterpact, *The Development of International Law by the International Court of Justice* (London: Stevens, 1958) Chapter 6. Mohammed Bedjaoui, "Expediency in the Decisions of the International Court of Justice, (2000) 71 BYBIL1, at 17-8.
[9] Lauterpacht, *supra* note 34, at 76.
[10] *Ibid.*, 91.
[11] *Ibid.*, 77.

the sensitivity of the Court.[12] Indeed, even an ex-President of the ICJ has explained in a piece that defends a pragmatic, "expedient" approach to aspects of that Court's jurisdiction,

> A decision dictated by expediency is therefore one which, while remaining legal, is inspired by feelings of appropriateness, wisdom or prudence. These are suggested to the International Court by its desire to promote justice and peace between States[13]

This is not to say that the ICC ought to be politicised in its decision-making. Far from it. The ICC, in the inspirational terms of David Bederman's, like all international organisations, has a soul,[14] and it is not the purpose of this chapter to suggest even an implicit Faustian bargain. It is a criminal court, and the criminal law aspects of its decisions ought to be based solely on legal concerns. Nonetheless, the ICC is, as mentioned above, a multifaceted body. There are various stages of its activities, most notably jurisdictional (including admissibility) and trial, and it would be naïve to deny that for the former (but emphatically not the latter) the ICC ought to have regard to the weight the (euphemistic) bridge will bear. To fail to do so will not only scare non-State parties, but also cause consternation with states parties, whom, lest it be forgotten, rightly or wrongly, control the budget, one of the most effective mechanisms of control that exist over the court.[15]

In aspects of the Court work that relate to the institutional aspects of the Court, and with respect to these parts of the Court's work, the fairly open nature of the language of the Rome Statute on matters such as complementarity means that there is room for the ICC to have regard to the acceptability of its jurisprudence to states.[16] It is worth noting that some early ICC jurisprudence has been criticized on the basis that it is over-adventurous with respect to complementarity.[17] In particular, William Schabas has described the approach of the Prosecutor and the Pre-Trial Chamber in the *Lubanga* case as "impetuous",[18] as he argued, and the Chamber accepted, that the Court need not defer to the prosecution of Lubanga for crimes against humanity and genocide ongoing in the Democratic Republic of Congo, as they were prosecuting recruitment of child soldiers.[19] As Schabas says:

> they took jurisdiction on the basis of an interpretation of the Statute which may be more intrusive with respect to the criminal justice of States than was ever intended. This could well have an impact on future ratifications of the Rome

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[12] See Edward McWhinney, *The World Court and the Contemporary International Law Making Process* (1979) Chapter II. For an enlightening view on the drafting of ICJ Judgments see Hugh Thirlway, "The Drafting of ICJ Judgments: Some Personal Recollections and Observations" (2006) 5 *Chinese Journal of International Law* 15, 16.

[13] Bedjaoui, *supra* note 34, at 3-4

[14] David Bederman, "The Souls of International Organizations: Legal Personality and the Lighthouse at Lake Spartel" (1995-1996) 36 VJIL 275.

[15] See Bekou and Cryer, *supra* note 6, at 58 (fn51).

[16] The ICTY at least arguably done this with respect to the question of issuing subpoenae to State officials, see *Prosecutor* v *Blaškić*, Decision on the Requires of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-94-14/1-AR108, A.Ch., 29 October 1997.

[17] Schabas *supra* note 3 at 182-4.

[18] *Ibid*., 183; Matthew Happold (2007) "Prosecutor v Thomas Lubanga" (2007) 56 *ICLQ* 713.

[19] *Prosecutor* v *Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, ICC-01-04-01/06, Pre-T.Ch. I, 10 February 2006, paras 37-9.

> Statute. Many States are carefully studying the first cases as the Court, to see whether its promise to defer to national prosecutions will be respected.[20]

Furthermore, it must be said, that some of the Court's decisions are not in-depth, and do not deal with all the arguments in great detail.[21] This is unfortunate, as the ICJ has found, it is important to show the "working-out" of the Court, to ensure that States who are looking at the jurisprudence of the Court are confident in its reasoning, and that their arguments will be taken seriously.[22]

Where matters come to trial, of course, the situation is different. A person is entitled, both by general international law,[23] and, more specifically, the Rome Statute, to be afforded a detailed list of fair trial rights, and it would be scarcely reconcilable with such rights for the ICC to determine the criminal law aspects of a case with regard to extraneous factors such as the extent to which States will accept that jurisprudence. The possibility of influence from States on matters relating to trial could only undermine the ICC, as some fear (or hope) has been the effect of the early practice of the Court in relation to Uganda (although admittedly, in this instance, not relating to ongoing trials),[24] and the *Barayagwiza* affair before the ICTR showed.[25]

3.2. Not Just Judges: The Practice of the Prosecutor

Of course, the judges are not the only interpreters of the Statute, the Prosecutor also has a role here, and a very important one. This is with respect to whether to initiate an investigation when he has either had a matter referred to him by States or the Security Council under Article 12, or by virtue of the *proprio motu* powers provided for in Article 15 of the Statute.[26] Indeed, given the political fallout that has accompanied prosecutorial choices so far (in particular the criticisms of the Prosecutor for focussing (rightly or wrongly) on Africa))[27] in terms of the perceived legitimacy of the Court the Prosecutor's role may be considered the most important one. Deciding which situations to investigate and which not to, is an exercise in judgment. Hence, in spite of the fact that Luis Moreno-Ocampo, the first Prosecutor of the ICC repeatedly asserted that he acted solely on the Law, and would not take into account political considerations, this was not broadly believed. And rightly so, the decision on situation selection is one which cannot be taken on solely legal grounds, and the practice of the Prosecutor has been criticised on this basis. In an earlier contribution, this author looked into the decision of the Prosecutor not to investigate the Iraq situation with this in mind. It is the purpose of

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[20] Schabas, *supra* note 3, at 184.
[21] *Ibid*., 182.
[22] Lauterpacht, *supra* note 34, Chapter 3.
[23] See generally Stefan Trechsel,. *Human Rights in Criminal Proceedings* (2005); Gabrielle McIntyre, Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY" in Gideon Boas and William A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2005) 193
[24] For a discussion of this practice see Matthew Happold, "The International Criminal Court and the Lord's Resistance Army" (2007) 8 *Melbourne Journal of International Law* 159.
[25] *Prosecutor v Barayagwiza*, Decision, ICTR-97-19-AR72, A.Ch. 19 November 1999. *Prosecutor v Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration) ICTR-97-19-AR72, A.Ch. 31 March 2000, see William A. Schabas, "Prosecutor v Barayagwiza" (2000) 94 AJIL 563.
[26] See generally section III of this volume.
[27] On which see e.g. Kai Ambos, '?? The African Criminal Court' in William Shabas *et al* (eds.), *The Ashgate Research Companion to International Criminal Law*(Aldershot: Ashgate, 2013) ??

much of this piece to look at some of the more recent aspects of the practice of the Court, to reemphasise that the Court, and its constituent organs, have a necessary diplomatic side. This involves both Parties to the Rome Statute, and no

SC

Sudan

11th report

63. In particular, over the next months, the UNSC can act upon UNSC 1593 and Presidential Statement 21 to secure the cooperation for the arrest of Ali Kushayb and Ahmad Harun. The Prosecution understands that the Council can accomplish this under various mechanisms including the existing UNSCR 1591 regime. UNSCR 1591, para 3(c) provides for application of these measures to individuals "who (…) commit violations of international humanitarian or human rights law or other atrocities." The UNSCR 1591 regime has already been put into practice through UNSCR 1672, which added four names of individuals to be subject to the measures set out in UNSCR 1591, namely freezing all funds, other financial assets and economic resources owned or controlled by the individuals in question.

64 notes has done it for ICTY

65. The legal framework for cooperation established by the Security Council through UNSCR 1593 and Presidential Statement 21 is clear. The failure to arrest Ahmad Harun and Ali Kushayb sends a signal that impunity will not only be tolerated, it will be encouraged.

66. The means to act are entirely within the UNSC's remit. The Prosecution would however urge the UNSC to focus first on individual measures in relation to Kushayb and Harun, in particular the identification and freezing of their assets

Para 94 As it prepares for the anniversary of resolution 1325 and for its special session of October 2010, the Council can take important measures, to ensure that Ahmad Harun and Ali Kushayb, both charged with crimes of sexual violence as war crimes and crimes against humanity, are subject to individual measures that will isolate them, ultimately ensure their arrest and surrender, and send the message to the victims in Darfur that the UN Security Council is protecting them

12th report
83. The GoS, as the territorial State, has the primary responsibility and is fully able to implement the warrants, with no external interference and consistent with its sovereign authority. It has not done so.

13th Report
The UNSC Presidential statement of 16 June 2008 which "takes note of the efforts made by the Prosecutor…to bring to justice the perpetrators of war crimes and crimes against humanity in Darfur and in particular notes the…transmittal by the Registry…of arrest warrants..[and] in this respect urges the Government of the Sudan and all other parties to

the conflict in Darfur to cooperate fully with the Court," has remained unheeded by the Government of the Sudan.
79. On 12 May 2011, the Pre-Trial Chamber issued its "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti." On 31 May 2011, the President of the Assembly of States Parties met the President of the UN Security Council to address this issue

15th report

51. The role of the Council in ending impunity and preventing the commission of new crimes cannot be overstated. Whenever the Council has expressed itself forcefully, cooperation with the ICC has been forthcoming. Whenever the Council, and the international community at large, have failed to integrate the peace and justice requirements, the Government of the Sudan has rejected cooperation.

57. The GoS has failed in its responsibility to cooperate with the Court and to arrest and surrender those individuals sought by the ICC. The obligation to ensure compliance, therefore, now falls on the collective community of States. It is for the Security Council to consider what measures can be taken to ensure execution of the arrest warrants short of military intervention. The Security Council issued Resolution 1593 (2005) under Chapter VII of the UN Charter. Until now the execution of the arrest warrants on the Sudanese territory was the primary responsibility of the GoS. The Council can assess new legal and operational possibilities for enforcing its decisions under Chapter VII in the case of the Sudan. The Office is not proposing that UNAMID be authorized to assist in the operations aimed at securing arrests. Instead, the Council can in due course evaluate other possibilities including asking UN Member States or regional organizations to execute arrest operations in furtherance of the arrest warrants issued by the International Criminal Court.

17th Report

46 It is a matter of real import that States in both the Security Council and the Assembly of States Parties address the issue in a concerted and united fashion. Implementation of arrest warrants is vital to the realisation of the goals of the Court and international justice. Without arrests, no trials are possible, and the search of victims for justice remains unanswered.

50 The Office of the Prosecutor calls on the Security Council to ensure Sudan's compliance with UNSCR 1593, and calls on Rome Statute States Parties to do whatever they can to promote cooperation and the arrest of individuals wanted by the ICC in the Darfur situation. The Office will continue to monitor the Darfur situation.

18th Report

19. On 9 October, the Office notified the Pre-Trial Chamber of the possibility of Mr Al-Bashir's travel to Addis Ababa on 11 October and subsequently to the Kingdom of Saudi Arabia on 13 October. The Chamber immediately invited the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia to arrest the suspect and surrender him to the

Court, in the event he enters their territory. In both cases, Mr Al-Bashir completed the contemplated travel and the warrants of arrest were not executed.

23. On 13 November, the Pre-Trial Chamber issued two decisions on cooperation: one in relation to the Central African Republic and the other relating to the Republic of Chad. The Chamber reminded both States of their statutory obligations to execute the pending decisions concerning the arrest and surrender of Mr Hussein to the Court and requested both States to immediately arrest Mr Hussein and surrender him to the Court should he enter their territory

53. The Office takes this opportunity to recall the eight communications from the Court informing the Security Council about non-cooperation in the Darfur situation, either by the Government of the Sudan or by other States, in relation to the four suspects at large.

54. In particular, the Office recalls the statement of the Chamber in these cases that "the ICC has no enforcement mechanism and thus relies on the States' cooperation, without which it cannot fulfil its mandate and contribute to ending impunity." The Council has not yet responded to these communications, neither has it taken any action.

55. The Council's silence and inaction contributes to the Sudan's continued determination to ignore the Council. As the Pre-Trial Chamber has further stated, "[w]hen the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile."

57. The Office calls on the Security Council to ensure the Sudan's compliance with UNSCR 1593, and calls on Rome Statute States Parties to promote cooperation and affect the arrest of individuals wanted by the ICC in the Darfur situation. The Office further notes that all States are urged by the Security Council to cooperate with the Court's investigations and prosecutions in Darfur. The Office will continue to monitor the Darfur situation.

58. Without stronger action by the Security Council and State Parties, the situation in the Sudan is unlikely to improve and the alleged perpetrators of serious crimes against the civilian population will not be brought to justice

Immunities (2013)

Libya

US

Palestine

Outreach to other States

The former two sets of powers have caused considerable controversy, in particular with respect to self-referrals,[28] and the Darfur referral.[29] Most diplomatically difficult, with respect to the initial decision to initiate an investigation, however, are those suggestions that the Prosecutor use his *proprio motu* powers, especially in relation to those which urged him to look into the situation in Iraq. In his initial response, the Prosecutor the Prosecutor took an approach grounded firmly in the Statute, noting that

> 38 Communications express the view that a crime of aggression took place in the context of the war in Iraq. The Court cannot proceed with respect to aggression until the crime is defined and the conditions for the exercise of jurisdiction set out. The Assembly of States Parties of the International Criminal Court may adopt such a definition to a review conference to be convened in 2009. Thus the alleged crime to which these communications refer does not fall within the jurisdiction of the Court.[30]

The emotions of the Prosecutor can only be speculated over, but there language of the response gives some reason to believe that there was, indeed, a sigh of relief over this. The communications on Iraq, nonetheless kept on coming, necessitating a further response, which came in February 2006. It is worth setting out the manner in which he responded in detail. The Prosecutor began by emphasising the limited nature of his role:

> While sharing regret over the loss of life caused by the war and its aftermath, as the Prosecutor of the International Criminal Court, I have a very specific role and mandate specified in the Statute. …The Rome Statute defines the jurisdiction of the Court and a limited set of international crimes…Unlike a national prosecutor, who may initiate an investigation on the basis of very limited information, the Prosecutor of the International Criminal Court is governed by the relevant regime under the Rome Statute. Under this regime, my responsibility is to carry out a preliminary phase of gathering and analyzing information, after which I may seek to initiate an investigation only if the relevant criteria of the Statute are satisfied.[31]

The Prosecutor clearly here is attempting to set out his own understanding of the importance of avoiding expansive claims of jurisdiction, thus ensuring that he adopted a position that is not overly threatening to states, whilst not appearing insensitive. This approach though, also sets up the substantive aspect of the response, which reiterates, and expands upon his earlier comments:

> The events in question occurred on the territory of Iraq, which is not a State party to the Rome Statute and which has not lodged a declaration of acceptance

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[28] On which see Jann Kleffner's contribution to this volume.
[29] Robert Cryer, "Sudan, Resolution 1593 and International Criminal Justice" (2006) 19 LJIL 195.
[30] ICC Press Release, Office of the Prosecutor, "Communications Received by the Prosecutor of the ICC", available at http://www.icc-cpi.int/organs/otp/otp_com.html, at 2.
[31] Iraq Response, 9 February 2006, available at http://www.icc-cpi.int/organs/otp/otp_com.html, at 1.

> under Article 12(3), thereby accepting the jurisdiction of the Court. Therefore in accordance with Article 12, acts on the territory of a non-State party fall within the jurisdiction of the Court only when the person accused of the crime s a national of a State that has accepted jurisdiction (Article 12(2)(b)). As I noted in my first public announcement on communications, we do not have jurisdiction with respect to actions of non-State party nationals on the territory of Iraq.[32]…Some communications submitted legal arguments that nationals of States Parties may have been accessories to crimes committed by nationals of non-State parties. The analysis of the Office applied the reasonable basis standard for any form of individual criminal responsibility under Article 25.[33]

On this basis, the Prosecutor stated that there was not sufficient evidence that there were such instances of complicity. This is interesting, however, given that the ICC proceeded to an evidential evaluation. It might be thought that it was odd that the Prosecutor felt it necessary to make this further response. The reason seems to be that the Prosecutor was responding at least in part to a report submitted by the NGO Peacerights to the Court in 2004. The report, prepared after an enquiry by eight eminent international lawyers,[34] asserted that there was sufficient evidence to establish that in addition to using cluster weapons itself, the UK had also allowed UK platforms to be used by US forces to fly sorties in which such weapons were used, including in built-up areas.

This was not quite the gravamen of the request to the Prosecutor, however. The report sought to use allegations of war crimes committed by the US to issue a collateral attack on the lawfulness of the war in Iraq. The report argued that British nationals could be held responsible for war crimes said to be committed by US nationals, owing to a joint criminal enterprise,[35] that joint enterprise being the crime of aggression against Iraq.[36] By doing so the report argued that the Court would not be acting *ultra vires* in declaring that the war in Iraq was unlawful, as in doing so the court would not be exercising jurisdiction over aggression as it was not actually holding any individual liable for the crime:

> In concluding that aggression had been committed, the ICC would not be exercising jurisdiction over aggression, as it would not be attempting to actually hold any person accountable for the crime. It would merely be reaching the view that the criminal enterprise of waging aggressive war had been committed as a preliminary circumstance to the prosecution of criminal acts over which it may exercise jurisdiction-namely crimes against humanity and war crimes.[37]

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[32] Original footnote, "The Office examined arguments submitted subsequently that were based on alleged connections to the territory of States Parties, but in light of the applicable law under Article 21, the peripheral connections indicated by the available information did not appear to satisfy the requirements for territorial jurisdiction."

[33] *Ibid*., at 3.

[34] Bill Bowring, the Chair of the Commission, identifies the others as Upendra Baxi, Christine Chinkin, Guy Goodwin-Gill, Nick Grief, René Provost, William Schabas and Paul Tavernier. Bill Bowring, *The Degradation of the International Legal Order: The Rehabilitation of Law and the Possibility of Politics* (2008) at 64. The report, (*Report of the Inquiry into the Alleged Commission of War Crimes by Coalition Forces in the Iraq War During 2003*) is available at http://www.peacerights.org/documents/A%20IRAQ%20REPORT%20Final.doc

[35] On which see, e.g. Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) pp.94-110; Mark Osiel, "The Banality of Good: Aligning Incentives Against Mass Atrocity" (2005) 105 Columbia LR 1751; Steven Powles, "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?" (2004) 2 JICJ 606.

[36] Peacerights Report, *supra* note 59, para 3.23

[37] Peacerights Report, *ibid.,* para 3.24

As the Chair of the Commission said, this interpretation "broke new ground".[38] Given that it dealt with, in practical terms, with making a declaration of the criminal nature of the attack on Iraq against a third State, when the crime is not, as the report itself noted, in the jurisdiction of the Court, it might be expected that the Prosecutor would be sceptical. He was. The response took what was unquestionably the diplomatically most sensible route:

> Many of the communications received related to concerns about the legality of the armed conflict. While the Rome Statute includes the crime of aggression, it indicates that the Court may not exercise jurisdiction with respect to it (Article 5(2). This arrangement was established because there was strong support for including the crime of aggression but a lack of agreement as to its definition or the conditions under which the Court could act…In other words, the International Criminal Court has a mandate to examine *conduct during the conflict*, but not whether the *decision to engage* in armed conflict was legal. As the Prosecutor of the International Criminal Court, I do not have the mandate to address the arguments on the legality of the use of force or the crime of aggression.[39]

Also, whether it might have been at one level satisfying for him to attempt to adopt such an innovative approach to the jurisdiction of the Court, the Prosecutor here was clearly aware of the risks that accepting the Report's analysis would have for the relationship of the ICC with states. This was with respect not only with states Party to the Statute, (who would probably have been unhappy about it) but, more importantly, with non-Parties to the Statute, who would be brought within the jurisdiction of the Court for their actions outside of the territories of State parties. It would have involved declaring that the actions of the US to be aggressive. The response of the US to what it would (not without some justification) have considered an exorbitant exercise of jurisdiction are quite predictable.

The US would be unlikely to be the only non-state party who would cry foul at such a decision, as other States would be concerned that their actions could be "declared" upon by the Court by virtue of an allegation that there was a joint criminal enterprise involving some actions that could be considered to be aggression, war crimes or crimes against humanity. It must be said, the interpretation would certainly not have been in accordance with the understanding of the drafters of the provisions of the Rome Statute, and thus the Prosecutor's actions must therefore be seen as legally, as well as diplomatically, sound.

There is another side to the Prosecutor, however, when he is dealing with one non-party state: Sudan. Sudan is in a special position with respect to the Court owing to the Security Council referral of the situation in Darfur to the Court in Resolution 1593. This in addition to the requirement that Sudan cooperate with the Court does create a *sui generic* position for Sudan, as a non-Party that is nonetheless obliged, by virtue of its membership of the UN to cooperate with the Court. Perhaps as a result of this status, and the truculent attitude of the Sudanese government towards the court, the Prosecutor has made some less than diplomatic comments about Sudan. Hence in 2007, the Prosecutor reported to the Security Council that Sudan

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[38] Bowring, *supra* , note 59, at 66.
[39] Iraq Response, *supra* note 56, at 4.

> Is not co-operating. The GoS [Government of Sudan] has taken no steps to arrest and surrender Ahmad Harun…Ahmad Harun is still allowed to play a role in this situation. As Minister of State for Humanitarian Affairs, he has been put in a position to control the livelihood and security of those people he displaced. The GoS has maintained him in this position with full knowledge of his past and present activities. GoS officials, far from taking steps to stop the crimes, publicly deny their assistance. These are clear indication of the support Ahmad Harun is receiving. Such active support to a person charged by the Court and to his activities warrants further investigations by the Office [of the Prosecutor].[40]

In these circumstances, the Prosecutor has therefore taken a very strong view. That view being that not only is the Sudanese government in violation of its obligations towards the Security Council, but that the assistance granted to Harun may amount to crimes in the Rome Statute. Given that none of the offences against the Court provided for in Article 70 of the Rome Statute seem to be appropriate, it appears that he means complicity in one (or more) of the offences in Article 5. This is a bold (although not unjustified) approach, and it seems only explainable on the basis that the Prosecutor does not feel inhibited when dealing with a situation referred by the Security Council,[41] as it is the Council who will bear the brunt of any criticism.

4. Judges and Diplomats

The necessity of understanding the context in which the court operates leads on to one of the criticisms that has been made of the early practice of the Court, (or to be more exact, the State parties' practice) which has been to elect, amongst the judges those with diplomatic experience.[42] There are those who have been critical of those appointments, on the basis that the judges should solely be drawn from the judiciary (or, where the critiques come from academics, from the judiciary and the academy). Although it is true that there are a number of judges on the Court who have come from backgrounds in government service, there are reasons to avoid undue critique of the court, and there are at least two reasons why there is more to this than a simple split between "pure" lawyers and those "tainted" with government service.

The first of these is that the primary ground upon which a person ought to be judged in this are is if they are a good lawyer or not. It would be invidious to discuss those at the Court, but two examples from elsewhere will suffice to show that those with governmental experience need not be anything other than first-rate. Both Sir Gerald Fitzmaurice and Philip Jessup had careers in government before moving to the bench. Whether or not all of their judgments are agreed with, their abilities as judges are beyond

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[40] Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) 5 December 2007 paras 3, 6.

[41] Some go as far as to consider the ICC as best viewed as almost being two courts, one when it acts on the basis of State referrals or the Prosecutor's *proprio motu* powers and another when the Security Council has referred a matter, George Fletcher and Jens David Ohlin, "The ICC: Two Courts in One?" (2005) 4 JICJ 428.

[42] This is an in issue which is by no means unique to the ICC, see for example Shabtai Rosenne, *The Law and Practice of the International Court of Justice* (4th ed., 2005) at 359.

debate.[43] Therefore, the fact that there are those with diplomatic experience should not, in itself, be a matter of concern. Where there are possible reasons to doubt impartiality, Judges are required to recuse themselves from sitting.[44] International Criminal Courts have, in the modern era, taken a sterner view of the grounds that require this than other international courts.[45]

There is, of course, the question of whether judges from government service will have been socialised into a certain form of thinking about international law, which favours the State.[46] There is the possibility of this, however, there are reasons to believe that this need not be overly concerning. First amongst these is that there are sufficient other members of the court to balance this interest. As Terris, Romano and Swigart's explain:

> Each person working for an international court carries a sense of how best to accomplish the job of justice, a sense created through long experiences in his home country surrounded by others with a similar understanding of the world or, alternatively, in the expatriate or diplomatic circles in which he grew up or served professionally before joining the court. In…judicial institutions…tensions related to different worldviews may arise, not only inside the courts themselves, which are characterized by alliances and hierarchies like other large institutions, but also in relation to the work they perform and the constitutencies they serve. Within these tensions, however, there exists an enormous potential for forging new and powerful collective approaches to justice that can still honor the multiplicity of cultural understandings found both inside the courts and around the world at large.[47]

Second, even accepting that such socialisation necessarily affects the approach of lawyers at a conscious or other level,[48] the contrasting argument might be made, that they act as a counterbalance to any unreasonably expansionist tendencies on the part of other members of the court. This relates to one of the major arguments in favour of having some members on the court with diplomatic (legal) experience. Their reading of the runes on what will prove beyond the tolerance of states is likely to prove useful for the court as a whole. In other words,

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[43] See, e.g. J.G. Merrills, "Sir Gerald Fitzmaurice's Contribution to the Jurisprudence of the International Court of Justice" (1977-8) 48 BYBIL 183 J.G. Merrills, "Sir Gerald Fitzmaurice's Contribution to the Jurisprudence of the European Court of Human Rights" (1982) 53 BYBIL 115; Oscar Schachter, "Philip Jessup's Life and Ideas" (1986) 80 AJIL 878.

[44] Rome Statute, Article 41(2), Rule of Procedure and Evidence 34, see Cate Steans, "Situations that Mat Affect the Functioning of the Court" in Roy S. Lee *et al* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 284, at 300-9.

[45] See Yuval Shany and Sigali Horowitz, "Judicial Independence in the Hague and Freetown: A Tale of Two Cities" (2008) 21 LJIL 113. Earlier international criminal courts were not as fastidious, see Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: OUP, 2008) 83-4

[46] See, generally e.g. Lyndell V. Prott, *The Latent Power of Culture and the International Judge* (1979).

[47] Terris, Romano and Swigart, *supra* note 32, at 62-3. They also note, *ibid*., at 36-7, that the collective nature of much judicial work helps with quality.

[48] And there is certainly evidence to the contrary. Philip Allott, for example, began his career as a government lawyer, and used his experiences to come up with a radical critique of the current international legal order and international lawyers, see. e.g. *Eunomia supra* note 8. His views on courts are similarly radical, see Philip Allott, "The International Court and the Voice of Justice" in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1995). For his views on government lawyers see Philip Allott, "The International Lawyer in Government Service: Ontology and Deontology" (2005) 23 *Wisconsin International Law Journal* 13.

> because international courts tackle very different sets of international and Transnational problems in various legal and political context, a bench made of a blend of people with different backgrounds is a crucial asset. Indeed, each of the three basic pools from which candidates are drawn contributes uniquely to the blend. Diplomats can provide an understanding of the larger political framework within which the case is embedded, as well as potential ramifications of judgments. Academics are able to connect the judgment to the larger construction of international law, providing the formal correctness and consistency necessary to buttress the legitimacy of the ruling. National judges, obviously, how to judge…Each group naturally has weaknesses as well. Diplomats tend to be too deferential to governmental and systemic interests and often argue for the status quo. Academics are often accused of being incapable of participating in a consensus, of being too abstract, and of being "maximalists" who are disinclined to make the necessary compromises of judicial work. National judges might have too little understanding and appreciation of international law and may not be as worldly as those in the other groups.[49]

A careful balance, naturally, has to be struck here, and much must be left to judgement, but courts must be careful, whilst respecting the reasonable expectations of states, to ensure their institutional integrity, and have to remain independent of states.[50] Finally, it may also be pointed out that socialisation is more than a one-way process, and being in the ICC itself is a part of a socialising process that operates on such people.[51]

4.1. Judicial Diplomacy

The next thing on point which needs discussion is that the ICC needs to engage in diplomatic work. Hence it is necessary to accept that when the ICC takes time (and spends money) on outreach work with States not parties, this is a useful thing. The Assembly of States Parties, as was seen at the outset of this chapter, has made clear that it views universal ratification as a goal, and this will not happen without outreach work with non-parties. Therefore, as the ICC itself has said:

> The primary responsibility for promoting ratification of the Rome Statute belongs to the States Parties and other supporters of the Court and not to the Court itself. Nevertheless, the Court contributes to others' efforts to achieve universality by providing information about its functions and role to interested audiences.[52]

Further to this, President Kirsch (an ex-Canadian diplomat) visited Japan a number of times to provide information about the Court, which helped contribute to Japan's accession to the Rome Statute, a major boost for the Court. He has also visited, *inter alia*, Turkey, Guatemala, Ukraine and Chile, and received visits from many other governmental delegations at the Court, and representatives from Inter-Govenrmental organisations such as the Arab League.[53]

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[49] Terris, Romano and Swigart, *supra* note 32, at 64.
[50] *Ibid*., 160.
[51] Prott, *supra* note 71, at 35-8.
[52] Report of the International Criminal Court 31 August 2007, A/62/314, para 42.
[53] *Ibid*. See also ICC Press Release ICC-CPI-20080307-PR292-ENG.

There has also been considerable outreach activity in the non-governmental sector, particularly in the US, where ICC President Kirsch has undertaken considerable work to increase knowledge of, and support of the ICC amongst those outside the government. The reason for this, is, in his words,

> I have found for a very long time that one of the best ways to ensure that the International Criminal Court ...has the support it needs to succeed in its mission is through providing accurate and as complete as possible about the Court.[54]

This is important work if a long term view is taken, and it might, admittedly a little optimistically, be noted that there has been, quietly, been something of a thaw towards the ICC in the Bush administration in the past few years, and both the Republican nominee (John McCain) and most of the Democratic candidates have expressed some degree of support for the ICC,[55] a large change from the Bush-Kerry competition of 2004, in which the ICC was a topic in which the candidates appeared to involve themselves in a competition to cast aspersions on the utility and advisability of the Court. The thaw that can be seen in US relations towards the court (which includes quietly providing some assistance in relation to the Darfur investrigations) seems unlikely to have occurred in the absence of some (private) contact.

The difficult question is how these need to be balanced against the judicial work of the court. This is again a difficult issue, but we do have some guidance, primarily from the code of judicial ethics which the ICC has promulgated. According to the Code, Judges are not to engage in any activities that are "likely to interfere with their judicial functions or to affect confidence in their independence."[56] This is not intended, however, to prevent them from doing or saying anything, Article 9 provides, though, that Judges "shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality…While judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they shall not comment on pending cases and avoid expressing views which may undermine the standing and integrity of the Court". Their extra-judicial activities are limited to those that are not "incompatible with their judicial function….or that may affect or may reasonably appear to affect their independence or impartiality." These guidelines, although at something of a level of generality, do provide the basic framework for the judges to understand the appropriate boundaries, such that making any promises about possible cases or situations that may arise for a state would be inappropriate, but that there is nothing wrong in explaining the Court and its activities to states. Again, the watchwords here must be care, prudence and sensitivity to how things will appear to others.

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[54] Philippe Kirsch, "The Role of the International Criminal Court in Enforcing International Criminal Law" (2006-7) 22 *American University International Law Review* 539, p539; see, similarly, Philippe Kirsch, "The International Criminal Court and the Enforcement of International Justice" (2005) 17 *Pace International Law Review* 47.

[55] The American Society of International Law have a very useful collection of the candidates' views available at http://www.asil.org/il08/il2008.html.

[56] ICC Code of Judicial Ethics, ICC-BD/02-01-05, Article 2.